

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

75-1151,

75-1152

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P/S

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

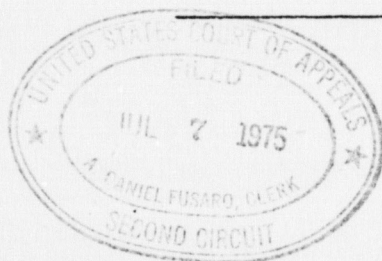
DOCKET NO. 75-1152

UNITED STATES OF AMERICA
PLAINTIFF - APPELLEE

VS

RONALD DI STASSIO
DEFENDANT - APPELLANT

BRIEF OF DEFENDANT - APPELLANT
RONALD DI STASSIO



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STATEMENT OF THE CASE

This is an appeal from a judgment imposed upon defendant
Ronald DiStassio on a two count indictment returned by a grand

jury of the District of Connecticut on April 9, 1974 against defendant Ronald DiStassio and co-defendant Frank Messenger.

Count one of the indictment charged defendant DiStassio with having used extortionate means to collect an extension of credit, on or about March 1, 1973, in violation of 18 U.S.C. Section 894 (1a).

Count two of the indictment charged both DiStassio and Messenger with having used extortionate means to collect an extension of credit, on or about October 4, 1973, in violation of 18 U.S.C. section 894 (1a, 2a).

Trial by jury commenced on November 19, 1974 before Honorable Robert C. Zampano, Judge, U. S. District Court, at New Haven, Connecticut.

DiStassio's motion for judgment of acquittal at the close of the Government's evidence was denied.

On November 27, 1974 the jury returned verdicts of guilty against DiStassio as to Counts one and two and a verdict of guilty against Messenger as to Count two.

A judgment of conviction was entered by Hon. Robert C. Zampano on March 26, 1975 adjudging DiStassio guilty as charged under Counts one and two and sentencing him to imprisonment for a period of four (4) years on Counts one

and two. The sentence imposed on Count two to be concurrent with the sentence imposed on Count one.

Thereafter, DiStassio filed a timely motion for judgment of acquittal or in the alternative for a new trial, which motion was denied by the Court.

Notice of Appeal from the judgment of conviction was filed by Ronald DiStassio on March 31, 1975.

STATUTES INVOLVED

18 U.S.C. § 2 Principals

a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

18 U.S.C. § 891 Definitions and rules of Construction

* * * *

7) An extortionate means is any means which involves the use or an express or implicit threat of use of violence or other criminal means to cause harm to the person, reputation, or property of any person.

* * * *

18 U.S.C. § 894 Collection of extensions of credit by
Extortionate means

a) Whoever knowingly participates in any way, or conspires to do so, in the use of any extortionate means

- (1) to collect or attempt to collect any extension of credit, or
- (2) to punish any person for the nonpayment thereof, shall be fined not more than \$10,000 or imprisoned not more than 20 years, or both.

* * * *

ISSUES PRESENTED

1. Did the government produce sufficient evidence against the defendant to warrant submission of the case to the jury?

FACTS

The principal Government witnesses against DiStassio were John Alicki and his wife Phyllis Alicki.

John Alicki testified that he had been wagering on football games with DiStassio in July of 1971 (T. 35) and that by October, 1971 owed him \$1,200.00 (T. 4, 5). In August, 1971, Alicki had sold his co-op at Stone Ridge and later received a check in the net amount of \$822.02 (T. 6, 7; Gov't Ex. A). Alicki then gave the check to DiStassio thereby reducing his indebtedness to approximately \$400.00. However, by October, 1971, he was indebted to DiStassio in the amount of \$1,500.00 (T. 10).

In November, 1971, Alicki was fired from his job at Hostess for padding the bills (T. 40, 41) so he joined the Marines on November 18, 1971 and was sent to Camp Pendleton in California (T. 12, 13).

He went AWOL from Camp Pendleton on April 10, 1972 and returned home to 546 Garfield Avenue, Bridgeport, Connecticut, where he remained with his wife until he was apprehended by the F. B. I. in October, 1972 (T. 46, 51).

Alicki was returned to the Marines, however, he

again went AWOL on March 6, 1973, came home, and stayed there until October 22, 1973, when he was again apprehended by the F. B. I. (T. 58, 59, 91, 92, 104).

He was discharged as an undesirable for the good of the service on December 5, 1973 (T. 88,124).

Alicki further testified that:

1. He did not see or hear from DiStassio during the whole time he was at home while AWOL (T. 13, 54, 56, 57, 60).
2. He never received a message that DiStassio wanted to speak with him during the period April, 1972 through October, 1972 (T. 56, 57).
3. Although he was home from March, 1973 until October, 1973, he did not receive any calls from DiStassio (T. 60).
4. He never called DiStassio during the entire time he was at home (T. 106).

While Alicki was AWOL, between 13 and 19 months, he would have to "duck" the F. B. I. so he would stay out almost every night of the week until approximately 12:30 A.M. (T. 117).

He would spend these nights either drinking or gambling at the horseraces (T. 117, 119). He would drink sometimes at the Benevento Society Club at night and hang around there during the day (T. 69).

Alicki admitted that he never had reason to believe that something might happen to his family (T. 104).

On October 4, 1973, he left the house at approximately 9:30 P.M. to go drinking at a local bar (T. 64). He returned home at 11:35 P.M. (T. 14, 74) and then went upstairs and asked his wife to make coffee. She told him that she smelled smoke and he ran downstairs looking for a fire (T. 15). He saw his car burning in the garage (T. 16). He telephoned the fire department three (3) minutes after he came home, i.e. 11:38 P.M. (T. 75).

The inside of the car was in flames so he got a hose and put the fire out (T. 18, 75, 76). He did not know how the fire was started and did not see either Messenger or DiStassio that night (T. 76).

Phyllis Alicki testified that she had met DiStassio in approximately 1963 when she was 15 years old (T. 305-310).

Thereafter, between December, 1972 and the end of February, 1973, she received six telephone calls from a man

she identified as DiStassio (T. 331).

She had never talked with DiStassio on the telephone prior to December, 1972 (T. 330) and she apparently had not talked with him personally since 1965, although she had seen him on the streets (T. 315).

Essentially, during the first 5 calls, the caller would ask for her husband and after she replied that he was not home, the conversations ended. During one or two of the calls the caller mentioned that her husband owed him some money and she told him he would get it and the conversations ended (T. 331, 332, 333). No threats of any kind were made (T. 332, 333).

The caller never identified himself during the first 5 calls (T. 334). The caller never demanded payment of any money during any of the six calls (T. 331).

She did not feel in any danger because of the first five calls (T. 333, 334).

The sixth call, upon which Count one of the indictment is based, occurred about a week prior to March 3, 1973, the date her son was born (T. 335, 336). There were 28 days in February and the call did not occur on the last day, but within the last week (T. 286).

It was during this sixth call that the caller

identified himself as "Ronny" (T. 350).

Mrs. Alicki testified, with regard to the sixth call, that the caller said it was "Ronny" and he asked for her husband to which she replied "If you keep bothering me, I'm going to call the cops" and Ronny told her "If you do, I'll put you in cement shoes, your husband and your children" (T. 223, 352, 366, 367).

On October 4, 1973, her husband left the house after supper, about 6:00 or 6:30 P.M. and told her he was going to the club (T. 361, 362).

At 11:30 P.M. she heard the doorbell ring and stuck her head out of the front window. She resided on the second floor of a two-story dwelling (T. 228, 229; Def't. Exs. 2-6). She looked down and saw two men standing on the first step of the front porch. She asked who it was and one of the men said "Ronny" (T. 230) and she then asked "Ronny who?" (T. 287) and he said "Ronny DiStassio" and asked "Is John home?". She replied "No, he's probably down the club". Nothing more was said. (T. 230, 231).

The other man, who she identified as Messenger, just stood there and never said anything (T. 231, 233).

She then observed them leave the porch and turn around the corner of the house, out of her view, heading towards the rear of the driveway (T. 233, 234).

She remained by the window and saw them walk back out front. They then went into a car parked in front of the house, Messenger on the driver's side and DiStassio on the passenger's and drove off (T. 235).

When the car was in front of her house, the lights were on and the motor was running (T. 235).

After she saw them go around the side of the house, she did not try to follow them by looking out either side or rear windows (T. 344) and never saw them go into the garage (T. 353).

She had not looked out any of her windows prior to 11:30 that evening and did not know whether or not anyone else had been in the rear of the house (T. 343, 344, 360, 361).

She testified that if anyone had been near the backyard, the dog downstairs would have barked (T. 344). She did not hear the dog bark all night (T. 345).

Mrs. Alicki was not worried about anything happening when she saw them disappear around the side of the house (T. 354), and the only thing she mentioned to her husband

upon his return was that "Ronny was here". He made no reply (T. 236).

Frederick Zwerdlein, an Assistant Chief in the Bridgeport Fire Department testified that the alarm was received at exactly 12:00 A.M. and he arrived there about two or three minutes later (T. 390).

The fire was extinguished when he arrived (T. 390, 409) and the police had already arrived (T. 408).

From his observations he concluded that there had been two separate fires. One from underneath the car and the other from the front seat of the car (T. 386, 387, 388, 412, 413). He also observed some debris, i. e. paper material, similar in appearance, around the car (T. 392, 411, 412, 414, 415) and inside the car (T. 388).

Based on these observations, it was Zwerdlein's opinion that the fire was "apparently incendiary". There is a difference between "apparently incendiary" and "incendiary", the latter requiring more proof. He did not have enough proof to make a determination that the fire was "incendiary" (T. 401, 402).

Zwerdlein also testified that cardboard and newspapers burn very quickly and that the fire had only been burning for a few minutes by the time the fire

department arrived (T. 403, 404) and it was still burning when the fire department got there. In his opinion the fire started at approximately between 11:45 P.M. and 11:55 P.M. (T. 406, 407).

DiStassio took the stand in his own defense and testified that he had known John Alicki about nine or ten years and knew Phyllis longer than that (T. 505).

He had not talked to her in about ten years, he had made a call to speak with her husband after he went into the service. He never made any other calls to either of them (T. 507).

DiStassio further testified that he was in Puerto Rico with a Mr. Buswell and his wife during the last week in February, 1973. They left on February 19th and returned February 27th (T. 508)

He corroborated most of the events of October 4, 1973 as testified to by Messenger (Brief-United States v. Messenger, Docket No. 75-1151, pgs. 10, 11, 12) (T. 508-516).

ARGUMENT

I. THE DISTRICT COURT ERRED IN DENYING DISTASSIO'S MOTIONS FOR JUDGMENT OF ACQUITTAL AS TO COUNTS ONE AND TWO.

A. The evidence was insufficient to support the guilty verdict.

In order to convict DiStassio for a violation of 18 U.S.C. §894, the Government had to prove beyond a reasonable doubt not only that DiStassio made the telephone call to Mrs. Alicki during the last week of February, 1973 but that the call was made "to collect or attempt to collect" the gambling debt owed by Mr. Alicki.

Mrs. Alicki described the conversation between the caller and herself as follows:

"The phone rang, I picked it up, he said it was Ronny, so he asked for my husband, so I said he wasn't there, so I said 'If you keep bothering me, I'm going to call the cops', so he said, 'If you do, I'll have you put in cement shoes, your husband and your children.'" (T. 367)

Even assuming arguendo that DiStassio was the caller, there was no mention made of any debt, nor any demand for payment.

In point of fact, no demand for payment had ever been made in any of the six calls she received (T. 331).

In United States v. Feudale, 271 F. Supp. 115 (D. Conn. 1967) the defendant was charged, inter alia, with making, for purpose of extortion, an interstate telephone threat to injure the person of one Hollis Whitman, in violation of 18 U.S.C. §875 (c). The defendant was alleged to have said "We want \$800.00 or we'll ruin you", whereupon he hung up.

Under the facts of the case, Chief Judge Timbers held that although this threat was a threat to Whitman's reputation which justified a conviction under 18 U.S.C. 875(d), it was not a threat to injure the person of Whitman and accordingly, acquitted the defendant on that charge. United States v. Feudale, at p. 218.

Since this call began as innocuously as the others, there is no basis for finding that this call was made for the purpose of extorting payment, but the previous ones were not. Accordingly, DiStassio's motions for acquittal should have been granted as to count one.

As for Count two, even when viewed most favorably to the Government, the evidence is not sufficient to meet the standard for criminal cases in the Second Circuit as

enunciated in United States vs Taylor:

"Whether the reasonable mind of a juror could draw such an inference from [the evidence] so that he might fairly conclude guilty beyond a reasonable doubt."

464 F2d 240, 244-245
(2d Cir. 1972)

Chief Zwerdlein's testimony, for example, raises more questions as to Messenger's and DiStassio's criminal responsibility for the fire than it answers.

His observation that the newspapers and cardboard underneath the car would burn very quickly and that it was still burning when he got there would point to the innocence of Messenger and DiStassio, since they would have already left before the fire started.

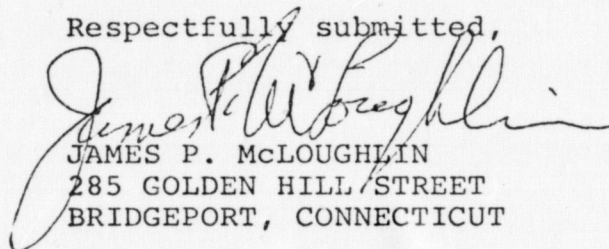
Furthermore, his lack of sufficient proof upon which to base a finding of "incendiary" as opposed to "apparently" incendiary, should not, in all fairness, furnish a basis for conviction upon such serious charges.

These critical facts, in combination with the inexplicable delay of over seven months between the telephone call to Mrs. Alicki in late February, 1973 and the burning of the car on October 4, 1973 were such that no reasonable juror could have fairly concluded guilt beyond a reasonable doubt.

CONCLUSION

The Defendant-Appellant, for all the reasons stated herein, respectfully requests this Court to reverse his conviction or in the alternative, to reverse his conviction and to remand for a new trial.

Respectfully submitted,

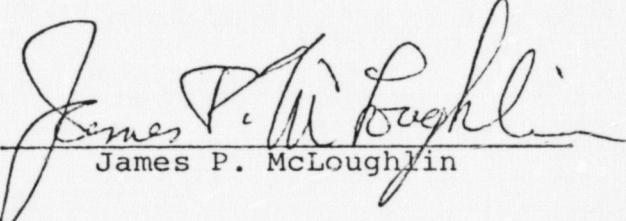
A handwritten signature in dark ink, appearing to read "James P. McLoughlin", is written over the typed name and address.

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ATTORNEY FOR DEFENDANT-APPELLANT

CERTIFICATION

This is to certify that on July 3, 1975 a copy of this brief was mailed first class postage prepaid to the Office of the United States Attorney, 141 Church Street, New Haven, Connecticut and to Peter Casey, Special Assistant U. S. Attorney, 450 Main Street, Hartford, Connecticut.


James P. McLoughlin